Supreme Court, U.S.
FILED
06-359 JUN 28 2006
OFFICE OF THE CLERK

NO. 05-

IN THE SUPREME COURT OF THE UNITED STATES

DAVIESS COUNTY, KENTUCKY
Petitioner
v.
NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

Allen W. Holbrook
Counsel of Record
Bryan Reynolds
SULLIVAN, MOUNTJOY, STAINBACK & MILLER, P.S.C.
100 St. Ann Building
P.O. Box 727
Owensboro, KY 42301-0727
(270) 926-4000

Robert M. Kirtley
Daviess County Attorney
212 St. Ann Street
Owensboro, Kentucky 42301
(270)685-8429

Counsel for Petitioners

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION
CIVIL ACTION NO.: 4:04CV-31M

NATIONAL SOLID WASTE MANAGEMENT PLAINTIFF ASSOCIATION

V.

DAVIESS COUNTY, KENTUCKY DEFENDANT

MEMORANDUM OPINION AND ORDER

This matter is before the Court on cross-motions for summary judgment. The Plaintiff, National Solid Waste Management Association (hereinafter "NSWMA") and the Defendant, Daviess County, (hereinafter "County") have simultaneously briefed the Court on their respective positions concerning the constitutionality of Daviess County's Solid Waste Ordinance KC § 830.5 (2004) (hereinafter the "Ordinance"). [DN 15, 16].

The matter is now ripe for decision. For the reasons set forth below, the motion by Plaintiff NSWMA for summary judgment is **granted** and the motion by Defendant Daviess County for partial summary judgment is **denied**.

I. STANDARD

The summary judgment standard requires that the Court find that the pleadings, together with the depositions, interrogatories and affidavits, establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The moving party bears the initial burden of specifying the basis for its motion and of identifying that portion of the record which demonstrates the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Once the moving party satisfies this burden, the non-moving party thereafter must produce specific facts demonstrating a genuine issue of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). The facts of this case are largely undisputed, and as both parties have moved for summary judgment, the Court reviews the uncontested facts.

II. BACKGROUND

Plaintiff NSWMA is a representative trade association

for Republic Services of Kentucky, LLC ("Republic"). Republic is a solid waste management business that is duly registered and operates in Daviess County, Kentucky. The Defendant, Daviess County, has proposed a new solid waste flow ordinance that will affect the disposal of waste collected by Republic. The Ordinance provides in pertinent part:

> 1. Daviess County Fiscal Court shall provide universal municipal solid waste collection within its jurisdiction through the grant of nonexclusive franchises.
> 2. All franchise agreements entered into under this ordinance shall require the party providing municipal solid waste collection service to dispose of the waste they collect at the Daviess County Landfill or Transfer Station.
> 3. Non exclusive franchises shall be granted to all haulers that are properly registered in accordance with KRS 224.43-315, and are in compliance with all other applicable laws and regulations.
> 4. No hauler shall be allowed to collect municipal solid waste in Daviess County unless granted a franchise by Daviess County Fiscal Court.
>
> Daviess County Ordinance § 830.5 (2004).

Republic currently disposes of waste at the County transfer station or in a Kentucky landfill owned by Republic. The proposed Ordinance requires all solid waste collected in the County to be disposed of at the Daviess County Landfill or

Transfer Station. Republic objects to the restriction since it will not be allowed to use its landfill. Further, Republic asserts that it may incur a future need to deposit solid waste outside of Kentucky. On behalf of Republic, NSWMA has challenged the constitutionality of the Ordinance.

Specifically, the question before the Court is whether the Ordinance violates the Commerce Clause, Art. I, § 8, cl. 3 of the United States Constitution. In determining if a particular law violates the dormant Commerce Clause, a court must engage in a two-step inquiry. First, a court must determine whether the law "regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce." Oregon Waste Systems., Inc. v. Department of Envtl. Quality of Oregon, 511 U.S. 93, 99 (1994). Discrimination is defined as the "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." Id. See also Waste Mgmt, Inc. v. Metropolitan Gov't, 130 F.2d 731, 735 (6th Cir. 1997). If a law discriminates against interstate commerce in favor of a

local business investment, it is virtually per se invalid, unless "the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." C & A Carbone, Inc. v. Town of Clarkstown, New York, 511 U.S. 383, 392 (1994) (citing Maine v. Taylor, 477 U.S. 131 (1986).

If the law is not discriminatory, the court must proceed to the second step. This second step is referred to as the Pike balancing test. [N]on discriminatory regulations that have only incidental effects on interstate commerce are valid unless 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.' Oregon Waste Sys., 511 U.S. at 99 (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). In order for a challenged Ordinance to be valid, the Ordinance must not be facially discriminatory *and* it must survive the Pike balancing test. Eastern Kentucky Resources v. Fiscal Court of Magoffin Co., Ky, 127 F.3d 532, 540 (6th Cir. 1997). By agreement of the parties, the only issue before the Court is the first prong of the analysis. Thus, this opinion

will only examine whether the Ordinance is facially discriminatory against interstate commerce.

III. ANALYSIS

The Commerce Clause provides that "Congress shall have Power...[t]o regulate Commerce...among the several States." U.S. CONST. art. I, § 8, cl. 3. Judicial precedent has wrung a negative implication from the text more commonly known as the "dormant" Commerce Clause. See CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 87 (1987). The dormant clause prohibits economic protectionism within the states. Further, it has been consistently interpreted to "invalidate local laws that impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of State." C & A Carbone, Inc., 511 U.S. at 390. The skeleton of the dormant Commerce Clause was formed as processed goods entered the stream of commerce. Nevertheless, it is the travel of solid waste that spurs on the evolution of the clause. See Huish Detergents, Inc.

v. Warren County, 214 F.3d 707, 713 (6th Cir. 2000) (noting that garbage has become the "modern legal battleground" of the Commerce Clause). Notably, it is not the garbage that is valuable, as "the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it." Carbone, 511 U.S. at 383.

Carbone, the seminal decision in flow-control ordinances, controls the analysis here. Carbone also involved a flow-control regulation. Id. at 387. A New York municipality, struggling to enact a comprehensive waste-management scheme, contracted with a local private contractor to build a new transfer station for recyclables. Id. The private contractor was allowed to operate the transfer station and obtain the profits from "tipping" fees for five years. At the end of the five years, the city could purchase the landfill for a mere token fee. Id. The city enacted flow control ordinances which guaranteed a minimum flow of solid waste to the transfer station. Id. Carbone, the plaintiff, operated a similar transfer station within the city and challenged the ordinances on Commerce Clause

grounds. Finding that the ordinances did violate the dormant Commerce Clause, the Court explained that by permitting only the "favored" local operator to process the city's waste, the ordinance prevented any out-of-state waste company access to the local market. Id.

The County advances several arguments why the Ordinance is distinguishable from Carbone and its progeny and, therefore, is not facially discriminatory. The Court will address each argument in turn.

A. United Haulers and the Private/Public Distinction

The County encourages the Court to adopt the rationale of the Second Circuit in United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 261 F.3d 245 (2d Cir. 2001). In United Haulers, the Second Circuit upheld a county's waste management plan that required that all solid waste and recyclables to be processed to an "[a]uthority designated facility." Id. at 250. The ordinance then designated five publicly-owned

facilities. United Haulers, a private waste collection company, challenged the ordinance as discriminatory against interstate commerce. Id. at 251. The United Haulers court found the undisputed public ownership of the facilities to be an important distinction from Carbone, as "[f]low control regulations...which negatively impact all private businesses alike, regardless of whether in-state or out-of-state, in favor of a publicly owned facility, are not discriminatory under the dormant Commerce Clause." Id. at 263 (emphasis added); See also East Coast Recycling, Inc. v. City of Port St. Lucie, 234 F.Supp.2d 1259 (S.D.Fla. 2002) (utilizing the private/public distinction discussed in United Haulers). The Second Circuit reasoned that in Carbone, "the Justices were divided over the *fact of whether* the favored facility was public or private, rather than on the import of that distinction." Id. at 259. Here, the County argues, the facility is clearly public and it negatively impacts all private businesses alike, both in-state and out-of-state.

The Court does not agree that the Carbone decision

turned on whether the facility was public or private. The minority criticized the majority for ignoring the fact that no benefit was bestowed on local private actors as a result of the flow control ordinance. They pointed out to the majority that the ordinance simply aided the government in satisfying a traditional governmental responsibility. Instead of being divided over whether the facility of public or private, it seems it simply did not matter to the majority that they facility was public.

The majority in Carbone focused instead on the effect of the flow control ordinance—that it hoarded solid waste, and the demand to get rid of it, for the benefit of the single local proprietor. The majority found that such a restriction discriminated against the stream of commerce, as "it allows only the favored operator to process waste that is within the limits of the town." Id. at 391. Because the movement of the waste was curtailed, the ordinance was per se discriminatory. Id. The Court found it immaterial that in-state processors and in-town processors were as affected by the prohibition as

out-of-state processors. Id. A State or locality may not "avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself." Id. (quoting Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, 504 U.S. 353, 361 (1992)). "The flow control ordinance at issue here squelches competition in the waste-processing service altogether, leaving no room for investment from outside." Id. at 392.

This analysis has since been utilized by the Sixth Circuit to invalidate flow-control ordinances that restrict the interstate movement of solid waste. See Huish Detergents, Inc, 214 F.3d 707 (designation of the city's transfer station as the sole processing site for solid waste was a per se violation of the Commerce Clause); Waste Mgmt. v. Metro. Gov't of Nashville and Davidson County, 130 F.3d 731 (6th Cir. 1997) (ordinance that mandated that all of city's residential waste be processed at a publically owned recycling facility was a per se violation of the Commerce Clause). As Daviess County points

out, the Sixth Circuit has not directly addressed the public/ private distinction. However, until it does so, the prudent course is to follow Carbone, Huish and Waste Management, to find that the Ordinance discriminates against the interstate flow of solid waste. The Court declines the invitation to adopt the public/private distinction found in United Haulers.

B. Evenhanded Regulation

Daviess County also contends that because the Ordinance regulates evenhandedly, it does not discriminate against interstate commerce. Under the County Ordinance, all waste disposal companies, both in-state and out-of-state, are equally prohibited from disposing of or processing the County's solid. However, as discussed above, Commerce Clause analysis examines whether the ordinance at issue curtails the *movement* of the articles of commerce. Carbone, 511 at 391. It is "immaterial that in-state processors and in-town processors [are] equally affected by the prohibition." Id.

C. Market Preemption

"The Commerce Clause only grants to Congress...the power to regulate commerce. Because the power conferred...is the power to 'regulate,' the strictures of the dormant Commerce Clause are not activated unless a state action can be characterized as a 'regulation.' At the threshold of its Commerce Clause analysis, the Supreme Court has drawn an important distinction between 'regulation' of, and 'participation' in, a market." SSC Corp. v. Town of Smithtown, 66 F.3d 502, 510 (2d Cir. 1995), cert. denied, 116 S.Ct. 911 (1996). "If the state is buying or selling goods as any private economic actor might, then it is engaging in 'market participation' that by definition falls outside the scope of activity governed by the dormant Commerce Clause." USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272, 1281 (2d Cir. 1995), cert. denied, 116 S.Ct. 1419 (1996). "A state's actions constitute 'market participation' only if a private party could have engaged in the same actions." SSC Corp v. Town of Smithtown, 66 F.3d at 512.

Daviess County argues that the Ordinance is

constitutional because it has completely "eliminated the market" for solid waste disposal. With respect to waste disposal, the County has conceded that the complete foreclosure of the disposal market is an act of market regulation–an act only achievable through the use of its governmental powers. Nevertheless, Daviess County contends that under the analysis in USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272 (2d Cir. 1995), cert. denied, 116 S.Ct. 1419 (1996), the Ordinance is constitutional. Babylon invoked the distinction between market participation and market regulation in both the collection and the disposal of solid waste. Id. In Babylon, a municipality used its regulatory authority under New York statutes to hire a private waste hauler with public funds and then required all residents to use that hauler. Id. at 1282. Then, the waste hauler was permitted to dispose of a certain amount of waste at the town-owned incinerator at no cost. Id. at 1278-79. Other waste haulers were required to pay a tipping fee per load. Id.

The Second Circuit analyzed the municipality's

collection and disposal regulations separately. The court found that although Babylon's collection scheme constituted market regulation, it did not discriminate against interstate commerce because it completely eliminated the waste collection market by hiring a contractor with public funds. Id. at 1282. Furthermore, the court found that Babylon's disposal scheme was a constitutional act of market participation. Id. at 1288-89.

Daviess County attempts to draw a factual and legal comparison between the cases, but Babylon does little to advance the County's cause here. It should be noted that the "elimination of the market" in Babylon was the elimination of the waste *collection* market, not the disposal market. Regardless, its reasoning is instructive. Although the Babylon court found the decision to eliminate the collection market was market regulation, it did not discriminate against interstate commerce since the town did not favor in-state garbage haulers over out-of state competitors. It noted that no one enjoyed a monopoly position selling garbage collection service in Babylon—not even the town itself since it was not

a seller of the services. The town provided garbage collection, not as a business *selling* to a captive consumer base, but as a local government providing services to its residents. "In short, because Babylon is not selling anything, it cannot be considered to be a favored single local proprietor as in Carbone." Id. at 1283.

Applying the same reasoning to the regulation of the disposal market in this case, it is readily apparent that the County's attempt to regulate the disposal market discriminates against interstate commerce. Daviess County is not buying disposal services, it is selling disposal services to a captive consumer base. As NSWMA emphasizes, Daviess County's Ordinance compels market actors (the garbage collectors) to purchase disposal services from the County to the exclusion of interstate commerce. Daviess County enjoys a monopoly as the lone seller of disposal services in the market. The Ordinance favors the single local proprietor. The waste collectors cannot dispose of the waste at any other facility. As noted above, Carbone found it immaterial that in-state and

out-of state processors were equally affected by the prohibition. "Although *Carbone* dealt with waste processing, its holding applies with equal force to the waste disposal market, compelling the conclusion that the County violated the Commerce Clause by prohibiting out-of-state disposal." Huish at 716. Thus, unlike the elimination of the collection market in Babylon, the elimination of the disposal market in this case does discriminate against interstate commerce.

The County argues that since it is constitutionally permissible for it to eliminate both the local garbage collection market and the disposal market using public funds, there should be no impediment to eliminating just the disposal market. Simply put, however, the disposal market is different. If a municipality is in the collection market it is necessarily also in the disposal market. It may have to buy disposal services or if it has disposal services to sell, it can sell them to itself. However, if a municipality is not in the collection market, but is in the disposal market, it can only be in the disposal market as a seller. If it uses its regulatory power to force those who

are in the collection market to buy disposal services from it rather than from someone across the state line, then such regulation violates the Dormant Commerce Clause.

D. Legitimate Local Interests

For all of the foregoing reasons, the Court finds that the Ordinance is facially discriminatory against the interstate movement of solid waste. If a law discriminates against interstate commerce in favor of local interests, it is virtually per se invalid, unless "the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." Carbone, 511 U.S. at 392; (citing Maine v. Taylor, 477 U.S. 131 (1986)).

Daviess County's interests are legitimate. The County has cited generally the deterrence of public waste dumping and widespread litter problems. Both the prohibition on public dumping and litter control are within the purview of a local government's traditional police powers. However, while the County suggests the Ordinance allows for low-cost

disposal services which helps to combat public dumping and litter problems, the County could more effectively combat these problems through no-cost disposal services. Thus, it appears there are other means to achieve these interests and the Ordinance does not survive "rigorous scrutiny."

III. CONCLUSION

For the foregoing reasons, this **IT IS HEREBY ORDERED** that the motion for summary judgment [15] by Plaintiff, NSWMA, is **granted**, and the motion for partial summary judgment [DN 16] by Defendant, Daviess County, is **denied**. The Court does hereby declare that the proposed Daviess County Ordinance 830.5 (2004) is unconstitutional and the County is permanently enjoined from enforcing the terms thereof.

UNITED STATES COURT OF APPEALS
WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION

CIVIL ACTION NUMBER: 4:04CV-31-M

NATIONAL SOLID WASTES
MANAGEMENT ASSOCIATION
PLAINTIFF

V.

DAVIESS COUNTY, KENTUCKY
DEFENDANT

JUDGMENT

This matter having come before the Court on dispositive motions filed by the parties, and the Court having issued a Memorandum Opinion and Order granting the Plaintiff's motion for summary judgment,

IT IS HEREBY ORDERED that judgment be entered in favor of the Plaintiff consistent with the Court's Memorandum Opinion and Order.

THIS IS A FINAL AND APPEALABLE ORDER

AND THERE IS NO JUST CAUSE FOR DELAY

This the 22nd day of November, 2004.

JEFFREY A. APPERSON, CLERK

By:/s/ Erica A. Skinner
Deputy Clerk